

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 April 2007

BALCA No.: 2006-INA-00049
ETA No.: P-04275-10793

In the Matter of:

RED BIRD LAWN SERVICES, INC.,
Employer,

on behalf of

EFRAIN GUEVARA CRUZ ,
Alien.

Certifying Officer: Stephen W. Stefanko
Philadelphia Backlog Elimination Center

Appearances: Donald L. Schlemmer, Esquire
Washington, DC
For the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title

20, Part 656 of the Code of Federal Regulations.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

STATEMENT OF THE CASE

On April 8, 2004, Employer, Red Bird Lawn Services, filed an application for alien employment certification on behalf of the Alien, Efrain Guevara Cruz, to fill the position of Landscape Gardener. The duties to be performed were described as follows:

Plan and execute small scale landscaping operation and maintain ground. Prepare and grade terrain, apply fertilizers, seed lawns. Transplant bushes and shrubs. Plan lawns and cultivate them selecting appropriate seeds according to lawns and shade condition, spray trees and plants. Clean grounds using rake, broom, hose of leaves, snow, weeds. Repair concrete soil during the winter months of depleted nutrients.

The work schedule was listed as a forty-hour work week, 8:30 to 5:00. Minimum requirements for the position were listed as two years of experience in the job offered or as a landscape worker. (AF 443-446).

Employer received no applicant referrals in response to its recruitment efforts. (AF 439).

A Notice of Findings (NOF) was issued by the CO on May 5, 2005, questioning Employer's ability to guarantee permanent full-time (year-round) work for the petitioned position. Noting that the work of a Landscape Gardener is generally performed seasonally and hence, not permanent in nature, the CO requested documentation that the

¹ This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised on Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

Alien will in fact perform the duties of a Landscape Gardener on a full-time year round basis. Specifically, the CO instructed:

You must submit your payroll records for the last three years for all workers employed in this or similar positions. *The weekly records must show each employee by name, the number of hours worked, and gross wages. W-2 Forms are not acceptable.*

The CO further advised:

The records must establish that the job duties are performed on a continuing basis; that the job is career oriented and one for which the applicant has demonstrated a commitment; and that, historically, occupants of the position have remained year after year and are not financially dependent on obtaining other employment or unemployment compensation during intermittent breaks in the year.

(AF 437-438).

In Rebuttal, Employer submitted weekly payroll records for its employees for the period from December 2001 through December 2004. (AF 15-435).

A Final Determination denying labor certification was issued by the CO on August 19, 2005, based upon a finding that Employer had failed to establish year-round, full-time employment for the petitioned position of Landscape Gardener. In denying certification, the CO cited Employer's payroll records as showing that beginning in late November/December through early March employment is part time. (AF 11-14).

Employer filed a Request for Reconsideration and Review by letter dated September 22, 2005, and the matter was referred to the Board and docketed on August 4, 2006. (AF 3-9).

DISCUSSION

The regulatory definition of “*employment*” for purposes of labor certification is “permanent full-time work by an employee for an employer other than oneself.” 20 C.F.R. § 656.3. In *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1993)(*en banc*), the Board held that landscaping jobs cannot be considered permanent employment where they are exclusively performed during the warmer growing seasons of the year, and from their nature, are not continuous or carried on throughout the year.²

In the instant case, Employer seeks labor certification for the position of Landscape Gardener. Citing the seasonal nature of the position, the CO advised Employer of the necessity to document that permanent, full-time (year-round) work was guaranteed for the job. As requested, Employer submitted payroll records for the three prior years. Upon review of those records, the CO concluded that the evidence did not support a finding that the job opportunity involves full-time work for the entire year. Specifically, the CO extracted the hours of work per pay period from the payroll records for each employee for the prior three years and recorded them on a table. Upon analysis, the CO determined that neither the Alien beneficiary nor any other worker was employed full-time for the entire year. The payroll records reflect that during the winter months employment is only part-time. (AF 8-9). The record supports the CO's analysis, and we find that Employer failed to establish that it was offering permanent, full-time employment.

In its Request for Review, Employer asserted its intention to increase the work hours during the winter months “with services of installing and repairing patios and retaining walls” and “adding additional snow removal accounts and offering services for storm related damages to trees and shrubs and other landscape related items due to inclement weather.” Employer also stated an intention to engage a full 50 plus weekly schedule for two full-time employees (the Alien and another employee). (AF 5). The

² The Board declined to overrule or modify *Vito Volpe* in *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*).

regulations, however, preclude consideration by the Board of evidence which was not “within the record upon which the denial of labor certification was based”. 20 C.F.R. § 656.26(b)(4). *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). “Under the regulatory scheme of 20 C.F.R. Part [656], rebuttal following the NOF is the employer’s last chance to make its case. Thus, it is the employer’s burden at that point to perfect a record that is sufficient to establish that a certification should be issued.” *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). Moreover, while the absence of a pre-existing position is not a *per se* bar to labor certification, Employer “must prove that it indeed has definite plans for business expansion and that the expansion will generate full-time, permanent work”. *Mouren-Laurens Oil Co.*, 1991-INA-236 (Aug. 11, 1992). Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof. *Marion Graham*, 1988-INA-102 (Mar. 14, 1990)(*en banc*). Thus, we find, even if considered, Employer’s bare assertion of an expanding business insufficient proof of the need for a full-time, year-round Landscape Gardener.

Based upon the foregoing, we conclude labor certification was properly denied.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

Judge Pamela Lakes Wood, concurring.

I concur in the result based upon the clear precedent of *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1993)(*en banc*). However, for the reasons stated in my dissent in *Crawford & Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*), I continue to believe that *Vito Volpe* was wrongly decided.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 2001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.